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SUPREME COURT U. S.

In The

Supreme Court of the United States

October Term, 1969

No. 208

EXCHANGE NATIONAL BANK OF CHICAGO,
Cross-Petitioner,

vs.

SIDNEY P. ABRAMSON, ALLIED REALTY OF ST. PAUL, INC., GERTRUDE BROWN, PHILLIP KITZER, SR. and HELEN KITZER, his wife, PHILLIP C. KITZER and HELEN KITZER, his wife,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1969—Northwest Brief Printing Co., 222 S. Fourth St., Minneapolis 55415 339-3979

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Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-petitioner, EXCHANGE NATIONAL BANK OF CHICAGO, prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on March 26, 1969, as affirmed that portion of the order of the United States District Court for the District of Minnesota, dated April 11, 1968, which denied cross-petitioner's motion for relief—by reason of the violation by Sidney P. Abramson (respondent) of Canon 36 of the American Bar Association's Canons of Professional Ethics—against others who may have acted in concert with respondent, and for corresponding relief beyond the mere disqualification of respondent.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered March 26, 1969, has not yet appeared in the printed reports and is set forth in Appendix B hereto, *infra*. The opinion of the United States District Court for the District of Minnesota is reported in 283 F. Supp. 464 (1968) and is printed in Appendix C hereto, *infra*. The separate order of the District Court, dated April 11, 1968, is unreported and is printed in Appendix D hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeals affirming that portion of the District Court's order from which cross-petitioner had appealed was dated and entered on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, in a case involving violation of the Canons of Ethics by an attorney, the relief granted was not so narrow and limited as to undermine the Canons of Ethics.

CANON OF ETHICS INVOLVED

The Canon of Ethics which the courts below have held violated by respondent is Canon 36, which provides:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

STATEMENT OF THE CASE

This case was commenced in the District Court for Ramsey County, Minnesota, Second Judicial District, on or about September 17, 1965, and a petition for removal joined in by all defendants, together with a removal bond, was filed on October 7, 1965, the case thereupon being removed to the United States District Court for the District of Minnesota, Third Division. The requisite grounds for removal existed in that the amount in controversy, exclusive of interest and costs, exceeded $10,000, and there was complete diversity of citizenship.

The relief prayed for in the suit was to void a $250,000 mortgage held by cross-petitioner and the subsequent foreclosure thereof. The plaintiff, Allied Realty of St. Paul, Inc. ("Allied Realty"), was initially represented by counsel other than respondent.

The mortgage transaction subsequently became involved in a lengthy federal criminal case against two of the defendants herein (Phillip Kitzer, Sr., and Phillip C. Kitzer), as well as three former employees of cross-petitioner.

Respondent, as Assistant United States Attorney and Special Assistant United States Attorney, aided in the preparation and prosecution of the criminal case. After he retired from public employ, respondent was retained as Special Counsel (to act with previously retained counsel) by Allied Realty on the basis of respondent's knowledge and background gained in the criminal case.

Respondent's first appearance on behalf of Allied Realty was to file, on November 24, 1967, an amended complaint, prepared and signed by him, based on the information developed during the criminal trial.

On January 25, 1968, cross-petitioner filed a separate action against respondent in the United States District Court for the District of Minnesota, seeking an injunction to re-

strain further violation of Canon 36 of the American Bar Association's Canons of Professional Ethics. The separate action was subsequently dismissed by the Court of Appeals for the Eighth Circuit, *sua sponte,* on the stated ground of absence of jurisdictional amount.

On February 29, 1968, Allied Realty moved in the case at bar for an order declaring (1) that respondent was guilty of no unprofessional or unethical conduct, (2) that respondent might continue to act as counsel for Allied Realty, and (3) that Allied Realty could use any and all documents, information and knowledge learned about, examined or obtained by respondent in the course of his employment as government attorney.

On March 11, 1968, cross-petitioner filed its motion (1) to declare respondent's conduct to be in violation of Canon 36; (2) to enjoin respondent, his agents, servants, employees and attorneys, and all persons in active concert or participation with respondent, from (a) acting as counsel in any action against cross-petitioner involving claims investigated by respondent during his prior employment as government attorney; (b) using information, documents or knowledge learned, examined or obtained by respondent in the course of his prior government employment; and (c) filing a lawsuit against cross-petitioner involving allegations prepared by or with the assistance of respondent; and (3) to expunge from the files the amended complaint prepared and filed by respondent on November 24, 1967.

On April 11, 1968, the District Court entered an order (App. D) denying the motion of Allied Realty as to parts (1) and (2) thereof, and granting the motion as to part (3) thereof. The order granted cross-petitioner's motion as to part (1) thereof, denied the motion as to part (2) thereof, except that the same was granted as to respondent individually, and denied the motion as to part (3) thereof.

Allied Realty took no appeal from the April 11 order. Respondent was granted leave to intervene and appealed to the Court of Appeals for the Eighth Circuit. Cross-petitioner filed a cross-appeal from the denial by the District Court of a portion of the relief prayed by cross-petitioner. On March 26, 1969, the Court of Appeals entered judgment affirming the April 11 order.

Respondent has filed a separate petition for certiorari seeking reversal of the Canon 36 issue which has now twice been decided adversely to respondent. Cross-petitioner seeks certiorari to obtain the full scope of relief needed to redress the clear violation of legal ethics which occurred in this case and to make the Canons of Professional Ethics meaningful and effective.

REASONS FOR ALLOWANCE OF THE WRIT

The order of April 11, 1968, was limited to respondent, individually, despite the fact that Rule 65(d) of the Federal Rules of Civil Procedure expressly provides that every order granting an injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

It seems clear that the April 11 order, limited as it is to a single named person, could easily be circumvented unless it is broadened at least to the extent required by Rule 65(d). If respondent is enjoined from the use against cross-petitioners of the information and knowledge which he has gained from matters investigated or passed upon by him in public employ, and that same information and knowledge is nevertheless usable when delivered by him into the hands of agents or attorneys or associates of his, it would seem that Canon 36 is rendered nugatory.

If everything he has discovered in the course of his public employment which he is enjoined from putting to use in another action may properly be handed over by him to others for the same uses to which he was going to put the same material, Canon 36 would by indirection become a nullity. The Canons are surely not intended to be interpreted in such a way as to permit anyone to do indirectly what he is forbidden to do directly.

Courts have not hesitated, in cases involving violations of legal ethics, to extend the scope of relief beyond mere disqualification of the attorney. Thus, in *United States v. Mahaney,* 27 F. Supp 463 (N.D. Cal. 1939), the court held not only that a former attorney for the Securities and Exchange Commission, who was thereafter retained by a defendant who had previously been investigated by the Commission during the attorney's employment, was to be enjoined from such representation, but the use of confidential information obtained by him while employed by the Commission was to be enjoined. The court invoked not only Canon 6 (because the attorney represented an adverse interest) but also Canon 36 (pages 467-8), Canon 37, and the California Code of Civil Procedure. The court held that the Government was entitled to enjoin the use *by defendants* in the pending litigation of confidential information obtained by the attorney while in the employ of the Commission.

It should be understood that cross-petitioner is not contending that if document X, or knowledge of it or information about it, is obtained through some proper source, it is nevertheless rendered unusable because it was also discovered by respondent in the course of his investigations while in public employ.

Material is usable—or not—depending upon the source from which it was obtained. Thus Canon 36 is given the effect intended: It disqualifies material which has been in-

vestigated or passed upon by a person in public office and prevents its use by that person or anyone gaining his knowledge of it through that person; but at the same time, it permits the use of the same material if gained from an unprohibited source.

Courts show no reluctance in ruling documents inadmissible which come from an improper source. A recent case emphasizing the rule (though one not growing out of the violation of canons of ethics) is *Knoll Associates, Inc. v. Federal Trade Commission,* 397 F.2d 530 (7th Cir. 1968). An order of the Federal Trade Commission was set aside by the Court of Appeals because documents used by the Federal Trade Commission to prove violation of the Clayton Act were found to have been put in the hands of the Commission by one who had taken them improperly. The Commission itself had no part in any improper conduct. Nevertheless the court found that the documents had come to the Commission through one who had obtained them unlawfully and accordingly concluded "that the Commission by its use of the documents knowingly gave its approval to Prosser's unlawful act." The court therefore held "that the use of the stolen documents renders the Commission's order unenforceable." (397 F.2d at 533-34)

In the same way, if respondent's colleagues or co-counsel are now to be permitted to use material received from respondent which he obtained in the course of his public employment, they will be using the fruits of his violation of Canon 36.

The whole question of ethical standards is currently being given specific and organized attention by the legal profession. The Special Committee on Evaluation of Ethical Standards of the American Bar Association has recently issued a Preliminary Draft of Proposed Code of Professional

Responsibility. The principle behind Canon 36 would be set forth even more broadly by proposed Canon 9:

> "A lawyer should avoid even the appearance of professional impropriety."

Proposed Disciplinary Rule 9-101 (B) would expressly cover the Canon 36 situation:

> "A lawyer shall not accept private employment in a matter in which he acted as investigator or exercised more than perfunctory responsibility while he was a public employee."

We submit that, at a time when the organized bar is moving in the direction of expanding and raising the level of the code of ethics of the legal profession, Federal Courts should surely not be moving in the opposite direction by granting unduly limited and ineffective relief in cases where the violation of ethical standards has been clearly established.

If Canon 36 is to be meaningful, its restriction must reach beyond the single person directly involved. And the responsibility for rendering the Canons of Ethics fully and broadly effective rests upon the courts. We believe that the instant case offers this Court an appropriate vehicle to establish the proper guidelines for relief in this area of the law.

As has been well said in the case of *Empire Linotype School v. United States*, 143 F. Supp. 627, 633 (S.D.N.Y. 1956):

> "Without firm judicial support, the Canons of Ethics would be only reverberating generalities."

CONCLUSION

For all the foregoing reasons, we ask that this cross-petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Rule 65(d)

Federal Rules of Civil Procedure

* * *

Rule 65(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,311

Allied Realty of St. Paul, Inc.,
Plaintiff,

vs.

Exchange National Bank of Chicago, et al.,
Defendants-Appellees,

Sidney P. Abramson,
Intervenor-Appellant.

No. 19,321

Exchange National Bank of Chicago,
Defendant-Appellant,

vs.

Allied Realty of St. Paul, Inc.,
Plaintiff,

Sidney P. Abramson,
Intervenor-Appellee.

Appeal and Cross-Appeal from the United States District Court for the District of Minnesota.

[March 20, 1969.]

Before VAN OOSTERHOUT, Chief Judge; MATTHES and BRIGHT, Circuit Judges.

VAN OOSTERHOUT, Chief Judge.

This is an appeal by intervenor Sidney P. Abramson from final order determining that Mr. Abramson is disqualified by reason of Canon 36 of the American Bar Association Canons of Professional Ethics from serving as an attorney for the plaintiff in *Allied Realty of St. Paul v. The Exchange National Bank of Chicago, et al.*, pending in the trial court. Plaintiff has not appealed from the disqualification order. Defendants have cross-appealed from the refusal of the trial court to extend the disqualification order to enjoin the use by the plaintiff of information obtained and services performed by Mr. Abramson and the refusal to extend the disqualification to other attorneys representing the plaintiff.

The trial court in a memorandum opinion supporting its order, reported at 283 F.Supp. 464, fully and fairly states the issues, the pertinent facts and the basis of its decision. We affirm the trial court's decision both upon the appeal and the cross-appeal for the reasons hereinafter stated.

A brief summary of the extensive background facts appears to be necessary to put the issues before us in proper focus. Plaintiff Allied Realty brought this action to set aside as fraudulent a mortgage it had given to the defendant bank. Such action has been pending since 1965 and was commenced prior to Mr. Abramson's appointment as attorney for the plaintiff. Plaintiff is a wholly owned subsidiary of American Allied Insurance Company. In 1965 the Minnesota federal grand jury returned an indictment against numerous individuals including three former employees of defendant bank for alleged criminal activity which brought about the failure and insolvency of Allied Insurance Company. Upon change of venue, the indictment was prosecuted in North Dakota. After a trial of thirteen weeks, all defendants were acquitted.

Abramson, who had previously served as Assistant United States Attorney, accepted employment as a Special Assistant United States Attorney to assist in the preparation and trial of the criminal case and actively participated in the investigation and the trial. The trial court upon the basis of a transcript of a portion of the record of the criminal trial, which was introduced in evidence, found:

> "These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.
>
> "Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pre-trial procedures." 283 F.Supp. 464, 467.

As the trial court's opinion shows, Mr. Abramson was appointed as an additional attorney for the plaintiff with the approval of the state court administering the receivership largely on the basis of relevant knowledge he had acquired in the criminal case. He subsequently caused an amendment to the complaint to be filed which was stated to be based on information available from the criminal case previously unknown to the plaintiff.

The American Bar Association Code of Ethics has been adopted by the Supreme Court of Minnesota as a standard of

professional conduct. Mr. Abramson spends considerable space in his brief to establish that he did not violate Canon 6 (conflicting interests) and Canon 37 (confidential information). There is no claim made in the present litigation that either of such canons was violated. Canon 36, the canon upon which the court based Mr. Abramson's disqualification, reads:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

The trial court in its opinion has clearly and convincingly demonstrated that Mr. Abramson's representation of the plaintiff in the present case is proscribed by Canon 36. Although Mr. Abramson's services as a government attorney had been completed and terminated prior to his employment as an additional attorney by plaintiff, he clearly falls in the category of having been in government employ and it is established as determined by the trial court that while so employed he investigated and passed upon matters involved in the present litigation.

Upon the facts before us, *Hilo Metals Co. v. Learner Co.*, D.C. Hawaii, 258 F.Supp. 23, and opinions 135, 49, 37 and 26 of the American Bar Association Committee on Professional Ethics, all of which are quoted or referred to in the trial court's opinion, support the conclusion reached by the trial court that Canon 36 requires the disqualification of Mr. Abramson as an attorney for the plaintiff.

We agree with the statement of defendants' counsel, endorsed by the trial court, that the breach of Canon 36 was inadvertent. Such determination has no bearing upon the result. The trial court held:

> "[T]he court believes that on a policy basis, it cannot make a subjective determination each time a similar

situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters." 238 F.Supp. 464, 469.

In *United States v. Trafficante*, 5 Cir., 328 F.2d 117, 120, the court, in upholding a disqualification of an attorney who had been previously employed by the government, states:

"It is not necessary, in order that disqualification result from a prior employment, that it be shown that the attorney acquired knowledge while representing the prior client which could operate to his disadvantage in the subsequent adverse representation. 5 Am. Jur. 297-298, Attorneys at Law, §66.

"The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' I Thessalonians 5:22."

The court upon the record properly determined that Canon 36 disqualifies Mr. Abramson from representing the plaintiff in this case.

Upon cross-appeal, defendants urge the court erred in refusing their request to extend the order entered in the following respects: (1) To Abramson's agents, servants, employees and attorneys, and all persons in active concert or participating with him; (2) to the use, by others than Abramson, of evidence, knowledge or information examined or obtained by Abramson; (3) to the commencement of any action (except by Abramson) against the Bank based upon pleadings prepared by Abramson or based upon information and knowledge gained by Abramson in the course of his public employment; and (4) to the amended Complaint in this proceeding prepared and filed by Abramson, which the Bank asked to be expunged from the files.

With respect to item (1), there is no evidence that any person acting for plaintiff is an agent, servant or employee of Mr. Abramson. Likewise, there is no proof that any other attorney representing the plaintiff in the case is a partner of Mr. Abramson's or that Mr. Abramson will directly or indirectly derive any financial benefit out of the fees paid by the plaintiff to any other person. As previously pointed out, this action was commenced prior to Mr. Abramson's appointment by other attorneys representing the plaintiff. We find nothing in the plain language of Canon 36 which would indicate that it is designed under ordinary circumstances such as here to reach beyond the attorney who previously held public office. The purpose of the Code of Ethics is to prescribe standards of conduct for attorneys. Such purpose with respect to Canon 36 is served by the disqualification of Mr. Abramson. The canon makes no provision either directly or by fair implication for abridging any right of the plaintiff or any other attorney who does not share fees with the disqualified attorney. The Code of Ethics applies generally to attorneys, not to litigants. Absent a fee sharing arrangement with the former public official, neither the plain words nor the policy underlying the canon requires that unrelated attorneys be barred from their right to represent the plaintiff.

With respect to item (2), the use of knowledge or information obtained by Mr. Abramson in his public official capacity, Canon 36 unlike Canons 6 and 37 contains no prohibition against disclosure of information obtained while a public servant. The canon on its face would not prohibit a former official from gratuitously passing on nonconfidential information which he obtained as a public official to an interested party. The purpose of the canon appears to be to prohibit an attorney from gaining financial advantage through the use of information which he obtained as a public official.

The record in the case before us shows that the information in controversy appears in the record of the criminal trial and that the information is not confidential. The United States Attorney filed an affidavit stating that he perceived no conflict of interest in the present situation and that the evidence used would be contained in the exhibits and the transcript of the criminal trial and in other public documents.

Defendants in their brief expressly disclaim any violation of Canons 6 and 37, which deal respectively with conflict of interest and disclosure of confidential information.

United States v. Mahaney, N.D. Cal., 28 F.Supp. 463, principally relied upon by the defendants in support of their cross-appeal, affords no support for defendants' position. That case involved an admitted violation of Canon 6 and the court found that confidential information obtained while in public employment was wrongfully disclosed.

Our discussion of item (2) fully applies to items (3) and (4). No sound basis exists for denying plaintiff the right to commence any appropriate action against the defendants which it chooses to bring and no reasonable basis exists for depriving the plaintiff of the benefit of any pleadings which Mr. Abramson may have prepared. The issue of Mr. Abramson's right to compensation for services performed before the disqualification order is not before us.

Defendants have wholly failed to establish that the trial court abused its discretion in refusing defendants the additional relief sought beyond the disqualification of Mr. Abramson as an attorney in the case.

The judgment is affirmed both on Mr. Abramson's appeal and defendants' cross-appeal.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

[Reported at 283 F.Supp. 464.]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-65 Civ. 309

Allied Realty of St. Paul, Inc.,

Plaintiff,

vs.

Exchange National Bank of Chicago, Gertrude Brown, Phillip Kitzer, Sr. and Helen Kitzer, his wife, and Phillip C. Kitzer and Helen Kitzer, his wife,

Defendants.

NEVILLE, District Judge.

Involved here is the applicability of Canon 36 of the American Bar Association Canons of Professional Ethics, which Canons were adopted by the Minnesota Supreme Court May 2, 1965 as standards of professional conduct. The canon provides in relevant part:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Plaintiff by motion seeks declaratory relief that a lawyer, Sidney P. Abramson, whom it has engaged as one of its counsel in this case, by so acting neither has nor is engaged in

unprofessional or unethical conduct. Defendant seeks an order to the contrary, barring Abramson's serving in such capacity and requesting other relief.

A related matter has been before this court before. *Exchange Nat'l Bank v. Abramson,* 278 F.Supp. 849 (D. Minn. 1968). The question herein was not squarely met in that case, though on review the Court of Appeals rendered the matter moot by holding this court to be without jurisdiction. *Exchange Nat'l Bank v. Abramson,* No. 19,188, 8th Cir., February 15, 1968.

A brief history is necessary. In 1965 the Federal grand jury sitting in Minnesota returned indictments against some 14 or more individuals for alleged criminal activity growing out of the failure and ultimate insolvency of American Allied Insurance Company. Three of the former employees of defendant Bank were among those so indicted. The plaintiff in this case, Allied Realty of St. Paul, Inc., is a wholly owned subsidiary of said Allied Insurance Company. At the time of the indictments, Abramson was employed full-time as an Assistant United States Attorney for the District of Minnesota, though he had little or nothing to do at that time with the handling of the indictments. He resigned as an Assistant United States Attorney in late 1966 to enter the private practice of law. A month or so later he was requested to return to government employ solely to become a Special Assistant United States Attorney to aid and assist in the preparation and act as "second chair" in prosecuting the criminal trials. The actual trial being removed to Bismarck, North Dakota on defendants' motion for change of venue lasted 13 weeks and is now embodied in some 17,000 pages of transcript. The trial proceeded only against those who were regarded by the government as the principal defendants, including Phillip Kitzer, Sr. and Phillip C. Kitzer, who are also defendants in this action and alleged to have been at

all times here relevant the principal owners and officers of American Allied Insurance Company and the principal officers of plaintiff herein, Allied Realty. The trial resulted in jury verdicts of not guilty as to each of the defendants then on trial, including the Kitzers. The indictments as to the other defendants, including the three former employees of defendant Bank, were thereupon dismissed. Abramson's service with the government ceased shortly thereafter pursuant to his own wish.

In 1965, prior to the federal indictments, a Receiver for the affairs of American Allied Insurance Company had been duly appointed by the Minnesota State District Court in Ramsey County. The present action above-entitled in fact was commenced prior to the return of the federal indictments, and is an action seeking to set aside a claimed fraudulent mortgage on Minnesota real estate issued by plaintiff Allied Realty Company and running in favor of the defendant Bank. It appears that this claim of a fraudulent mortgage as to this transaction was involved and asserted at some stage in the 13 week criminal trial at Bismarck, North Dakota. It is asserted in the complaint in this case that the Kitzers, as principal officers and directors of plaintiff, engineered the claimed fraudulent mortgage or mortgages and certain other transactions.

In connection with his activities at the criminal trial, Abramson is very frank to admit that he was intimately associated on the government's side with the trial of the criminal case and sat through the entire trial. He became aware of, or certainly had access to, various FBI and postal inspectors' written and oral reports and had knowledge of, and available to him, the grand jury minutes and all grand jury and government exhibits. He assisted extensively in the trial preparation. Prior to the institution of the criminal action by the federal government, a number of plaintiff's records

were subpoenaed and submitted to or used before the indicting grand jury. Many of the same documents, however, and perhaps others were actually used in the criminal trial. It was some several months after completion of the criminal trial that the Receiver for American Allied Insurance Company requested Abramson to associate himself as one of the counsel in this case. The Receiver did this for the reason, as set out in his petition to the District Court of Ramsey County, Minnesota, that:

> "The employment of Mr. Sidney P. Abramson as special counsel in these matters should, in the opinion of the petitioner, be generally advantageous to the receivership estate and should likewise result in substantial over-all saving of legal time and expense to the estate by virtue of the extensive knowledge and background Mr. Abramson now has in respect to matters particularly relating to the Exchange National Bank of Chicago as a result of his participation as Special Assistant to the United States Attorney in the criminal trials recently concluded at Bismarck, North Dakota, involving the trial of certain former officers of American Allied Insurance Company and Allied Realty of St. Paul, Inc."

The Receiver employed Abramson, pursuant to the order of the Ramsey County court, as special counsel (1) to associate himself as attorney in this case and (2) to institute a new action to recover funds from this defendant for other matters and various transactions. The latter case, while still in the threatened stage and before actual service of any complaint was challenged by a separate suit brought by the defendant Bank in this court. It was in this separate suit, the object of which was to enjoin the Allied Receiver from the bringing of a threatened suit so long as Abramson represented him, that the Court of Appeals held the jurisdictional amount of $10,000 was lacking. Such a jurisdictional lack cannot, it seems to this court, be asserted or claimed in the

present proceeding which is not a separate suit solely to challenge Abramson, but is a motion in a presently pending suit (which itself clearly involves more than the jurisdictional minimum) to bar Abramson's association as counsel for plaintiff.

It should be clearly noted that this is not a case wherein an attorney leaves the government employ and becomes retained by the person or company against whom the government has been proceeding. Such would be "switching the sides" in direct contravention of Canon 6 of the aforesaid Canons. No such charge is here made. The position Abramson now takes is consistent with and not adverse to the one he took while with the government.

Nor does the situation at hand involve Canon 37 which prohibits the disclosure of the client's private and confidential information, for there has been filed with this court a full consent to Abramson's proceeding in this matter, signed by the United States District Attorney for the District of Minnesota.

In its brief, counsel for defendant says of Abramson:

> ". . . both informally in Your Honor's Chambers, and on the record at the hearing on our motion for preliminary injunction, we made clear that we are not only *not* attacking the Defendant's character or integrity but we are saying affirmatively that we are satisfied — as no doubt the Court is satisfied — that Mr. Abramson's breach of Canon 36 was inadvertent." (Emphasis added.)

The court quite agrees with and endorses this statement.

The question then comes down to whether an attorney who has "investigated" or "passed upon" a particular matter while in the government employ may avail himself, after his government service, of a private legal retainer which involves not just his experience, knowledge and expertise acquired while in the government employ, but involves the use of his

knowledge of a particular case or proceeding. It is this latter which makes Abramson's employment particularly valuable to the Receiver in this case, and which this court feels it necessary to condemn. Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter—for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay. This, it seems, is the situation in the present case and exactly the type of involvement which Canon 36 was designed to prevent.

The distinction attempted to be made that Abramson technically did not "investigate" or "pass upon" within the meaning of Canon 36 is tenuous, when it is considered that he devoted many hours to preparation for trial and spent the 13 weeks in the court room substantially every day if not every day assisting at trial. Such activity certainly is within the pale of Canon 36.

Five pages from the lengthy criminal trial transcript were introduced and received at the hearing before this court. These pages indicate that the government in the criminal trial attempted to show, through a series of exhibits, the mortgage transaction involving the Minnesota real estate, the subject of the present case. Neither the Receiver nor Abramson argue that this mortgage is not the same mortgage as the

one involved in this case nor that such evidence was not adduced in the criminal trial. Abramson in fact reviewed many documents with officers of defendant Bank in preparation for trial, including the aforesaid mortgage documents.

Abramson does not contend that he did not marshal the documents relevant to the Minnesota mortgage transaction. Indeed, his statement which is very frank that he saw every Bank document put in evidence, coupled with the transcript showing Bank records being introduced, compels the conclusion that Abramson passed upon them with more than a mere summary perusal. Additionally, Abramson questioned Bank employees and participated in numerous pretrial procedures.

In November, 1967, after his appointment, Abramson moved the court to amend the civil complaint on the ground "that information available to plaintiff as the result of a proceeding entitled *United States vs. Phillip Kitzer, Sr., et al.*, concluded in June of 1967, produced information thereto unknown to the plaintiff bearing upon the facts of the above-entitled matter." While it is true that the realty transaction was not one of these transactions set out in the criminal indictment, nevertheless, evidence thereof was adduced at that trial. In sum, the court holds that the mortgage transaction constituted at least a part of the subject matter of the criminal trial and that Abramson, as Special Assistant United States Attorney, "investigated" and "passed upon" such matters within the meaning of Canon 36.

Defendant Bank submits that *Hilo Metals Co. v. Learner Co.*, 258 F.Supp. 23 (D. Ha. 1966) dealt with an identical factual situation and should be followed here. Abramson, on the other hand, suggests that *Hilo* is distinguishable on several grounds, and in any event argues that it reaches an unwarranted result. In *Hilo*, an attorney had been employed by the Justice Department, Antitrust Division, and had actively engaged in the investigation and prosecution of crim-

inal antitrust actions against the Learner Company. After retiring from the Justice Department, he accepted employment with Hilo Metals Co., Ltd., for the purpose of prosecuting on its behalf a private treble damage antitrust suit against the same defendant, the Learner Company. Defendant contended that the attorney had violated Canon 36 and should be disqualified. The court so held.

Since the court has found that Abramson investigated and passed upon the subject matter of the realty transaction involved in this case, the *Hilo* decision is highly persuasive authority. Abramson attempts to distinguish the instant circumstances on several grounds. First, it is argued that defendant Bank was not a defendant in the criminal action, but simply occupied the status of a witness; Second, the Bank is quasi-public, and therefore it should not be permitted to argue that it would not have turned its records over to Abramson but for the official position he then held; Third, the Receiver now employing Abramson is also quasi-public and should not be penalized against the public interest; Fourth, Abramson was in only an insignificant role as Special Assistant and therefore could not use his authority to prepare the case to benefit a subsequent private client; and Fifth, the action herein is not a continuation of the criminal matter in any respect whatsoever, unlike the *Hilo* case. The court acknowledges that the above contentions are for the most part true, but does not believe that such constitute legally significant distinctions from *Hilo*. This view is taken because the policy behind Canon 36 and the *Hilo* case is not altered in any respect by the distinctions asserted by Abramson. That policy is best articulated in conjunction with a discussion of Canon 36 set out by Judge Kaufman in *The Former Government Attorney and the Canons of Professional Ethics*, 70 *Harv. L. Rev.* 657 (1957), which is perhaps the

only comprehensive discussion of Canon 36 available in the literature.

Judge Kaufman observes that Canon 36, in conjunction with Canons 6 and 37, have two broad and basic purposes. First, they seek to protect a client's confidential communications. Second, they attempt to avoid an "appearance of evil." It is true that neither confidentiality nor conflicting interests are here involved. Canon 36 does not speak in terms of either. Both Canon 36 and the *Hilo* decision applying it are justified on the "appearance of evil" rationale if for no other reason.

When a government attorney resigns and enters private law practice if he is permitted to seek employment in a matter which he has previously handled for the government, he is in a position either to charge a client a fee because of his knowledge acquired through his former office, in which event he is then being remunerated twice in essence, or if he does not charge a fee therefor, the private litigant fortunate enough to obtain his services places the adverse party at a disadvantage both economically and strategically. Even when neither of these results transpire, there is certainly "an appearance of evil" which this court finds justifies the disqualification of such attorneys.

United States v. Standard Oil Co., 136 F.Supp. 345 (S.D. N.Y. 1955) is the decision which apparently precipitated Judge Kaufman's article in the Harvard Law Review. Judge Kaufman wrote the opinion in that case, holding that the government must prove that an ex-government attorney investigated or passed upon the subject matter involved to justify disqualifying him in a subsequent civil suit. Although the case is inapposite to the instant facts, because it involved representation without the approval of the United States government, Judge Kaufman noted another possible "appearance of evil" prevalent in these circumstances. He referred to H. S. Drinker, *Legal Ethics* p. 130, where the problem is

discussed of preventing "even the appearance that the government servant may take a certain stand in the hope of later being privately employed to uphold or upset what he had done." 136 F.Supp. at 359. A rule of law permitting government attorneys to seek employment after retirement dealing with identical subject matter would permit the argument that while in the public employ they investigated and prosecuted only those matters conducive to successful civil employment later. There is absolutely no evidence that Abramson in the instant matter intended to so aid his practice in working as Special Assistant, but the "appearance of evil" so detrimental to the profession appears to be present. Again the wisdom of Canon 36 and the *Hilo* decision is shown.

As *United States v. Standard Oil Co., supra,* was inapplicable to the instant case, so is *United States v. Mahaney,* 27 F.Supp. 463 (N.D. Cal. 1939), which is another decision dealing with advocacy of conflicting interests without permission of the former government client. Only the *Hilo* decision bears directly on the facts at bar. Because of the policies behind that decision as pointed out above, the court follows that case.

The defendant Bank also points to Opinion 135 of the American Bar Association Committee on Professional Ethics and Grievances as authority for its position. In that opinion the Committee condemns a practice whereby a public prosecutor accepts employment from one of the parties to an automobile accident case after investigating the case from a criminal standpoint for the State and declining to prosecute. The rationale used by the Committee noted the coercive effect that a prosecutor may have on private individuals he interviews and may lead them to divulge information that could be used in a civil action. The opinion reads in part as follows:

> "If the lawyer making the approach does so under sanction or color of official power, he thereby more cer-

tainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge vs. Capps, 56 Okla. 678, 156 P. 624."

The Bank contends that the same rationale is available in this case, though Abramson argues in effect that here the Bank is such a sophisticated witness that it was in no fashion coerced by the government. While Abramson may in fact be correct in his analysis, the court believes that on a policy basis, it cannot make a subjective determination each time a similar situation arises and that in general a prohibition should visit ex-government attorneys who have been involved with particular matters and later contemplate private civil employment in the same matters. The same finding is true with regard to numerous other minute distinctions counsel attempts to show to distinguish the instant case from *Hilo* and the policy of Canon 36. A quote from *Hilo* is appropriate:

"The philosophy of Canon 36 was well stated by the Committee in its opinion #49. With particular reference to that portion of the canon here involved, the opinion reads:

. . .

'In *Opinion 26*, we stated that the second paragraph of the canon:

> was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or public employ.

and, in *Opinion 37*, when referring to *Opinion 26*, we stated:

> The basis of this decision was that as a public legal official he was acting for the state, and he

> should not later accept any private employment in the same matter *(whether for or against his former opinion or position)*, on account of the manifest possibility that his action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or upset what he had done.' (Emphasis added.)"

Under the above interpretations of Canon 36 and the present state of the case law, Abramson must be disqualified as an attorney in this matter.

Defendant, in its counter motion, has requested an order restraining and enjoining Abramson and "his agents, servants, employees and attorneys, and all persons in active concert or participating with him" from:

(a) participating further as counsel in this case;

(b) using evidence, knowledge or information examined or obtained by Abramson in connection with this and any other litigation; and

(c) commencing any action against defendant Bank in the United States District Court in Chicago, Illinois.

As to (a) above, the court does not feel it has authority, nor is the court inclined, to enjoin or remove other attorneys for the Receiver from continuing so to serve in this or any other case.

As to (b) above, there is no showing that plaintiff intends to use anything but documents, testimony and information that have become public by virtue of inclusion in the aforesaid 13 week criminal trial at Bismarck plus any documents and information that could normally be discovered from defendant or others by discovery proceedings under Rules 26 through 37 of the Federal Rules of Civil Procedure. The court therefore does not suppress or deem "tainted" or "immunized" any of plaintiff's intended proof at the trial even

though such may have been "examined or obtained" by Abramson.

Relative to (c) above, the Receiver certainly is free to commence any action it desires, and such is not being enjoined by this court. The court does not wish in any way to prohibit the Receiver from continuing this lawsuit nor endeavor to thwart his prosecution of any other lawsuit in any fashion, except for the disqualification of Abramson. Again, the court by this decision does not impugn in any way Mr. Abramson's character or integrity.

A separate order has been entered herein in accordance with the views expressed in this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-65 Civ. 309

Allied Realty of St. Paul, Inc.,

Plaintiff,

vs.

Exchange National Bank of Chicago, Gertrude Brown, Phillip Kitzer, Sr. and Helen Kitzer, his wife, and Phillip C. Kitzer and Helen Kitzer, his wife,

Defendants.

ORDER

The above-entitled matter came on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota, on March 25, 1968, on the motion of the plaintiff, Allied Realty of St. Paul, Inc., for an order declaring (1) that its attorney, Sidney P. Abramson, "has been guilty of no unprofessional or unethical conduct" in representing the plaintiff; (2) that Sidney P. Abramson may act according to an order issued by a Ramsey County district court appointing him as counsel for the plaintiff; and (3) that the Receiver for the plaintiff is not in any manner prejudiced or otherwise disabled from prosecuting the above-entitled matter against the defendant herein. Defendant, Exchange National Bank of Chicago, moved the court for an order (1) declaring that

Sidney P. Abramson acted and is acting in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association; (2) restraining and disqualifying Abramson, his agents, servants, employees, associates and all persons in privy with him and others from (a) acting as counsel in any action against the Exchange National Bank involving claims raised as subject matter in a prior official United States Government investigation and prosecution; (b) using information, documents or knowledge learned, examined or obtained by Abramson as an Assistant or Special Assistant United States District Attorney; and (c) filing a lawsuit styled "draft complaint" attached as Exhibit D to a complaint in *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.), involving allegations in said complaint and prepared by or with the assistance of Abramson; and (3) expunging the complaint in this action as amended November 24, 1967. Appearing for the plaintiff in support of the motion were Briggs & Morgan by David Forsberg, First National Bank Building, St. Paul, Minnesota together with Sidney P. Abramson, Esqs., 1001 Degree of Honor Bldg., St. Paul, Minnesota. Appearances for the defendant were by Best, Flanagan, Lewis, Simonet & Bellows by Harold Evarts, Esq., 1200 First National Bank Bldg., Minneapolis, Minnesota; D'Ancona, Pflaum, Wyatt & Riskind by Edgar Bernhard, Esq., 33 North LaSalle Street, Chicago, Illinois; Raskin, Downing & Dammann by Merrill A. Freed, Esq., [sic] 105 South LaSalle Street, Chicago, Illinois. The parties stipulated into the record that the evidence upon which the court may base its findings includes all of the records, files, exhibits and evidence in a certain proceeding related to the issues herein which was brought before this court in a case entitled *Exchange National Bank of Chicago v. Sidney P. Abramson,* No. 3-68 Civ. 24 (D. Minn.).

The court has examined the pleadings, motion papers, accompanying affidavits and testimony properly before it, and has read and examined the briefs submitted by the respective parties. On the basis thereof, and on the basis of all of the files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiff be, and the same hereby is denied as to parts (1) and (2) thereof and granted as to part (3) thereof.

IT IS FURTHER ORDERED That the motion of the defendant Bank is granted as to part (1) thereof, denied as to part (2) thereof except that the same is granted as to Sidney P. Abramson individually, and denied as to part (3) thereof.

Dated: April 11, 1968.

/s/ PHILIP NEVILLE
United States District Judge